IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.1474 OF 2002

The Brihanmumbai Municipal
Corporation thru'
The General Manager,
BEST Undertaking ..Petitioner.

Vs.

Mr.Javid Abdul Mulla ..Respondent.

....

Mr.S.K.Talsania with Mrs.R.N.Vora i/b M/s.Crawford Bayley & Co. for the Petitioner.

Mrs.Hutoxi Tavadia for the Respondent.

....

CORAM : DR.D.Y.CHANDRACHUD, J.

31st March, 2005.

ORAL JUDGMENT :

1. The Respondent was engaged by the Bombay Electric Supply and Transport Undertaking (BEST) and, at the material time, was functioning in the substantive capacity of a Deputy Charge Engineer in

the T/7 Grade. On 23rd June, 1995 the Respondent was allegedly caught red handed by the Anti-Corruption Bureau while accepting a bribe of Rs.600/- from a person who was dealing in garments. The complainant had reported the demand for a bribe to the Anti Corruption Bureau and a trap was laid on 23rd June, 1995. The Respondent was arrested and was produced before the Metropolitan Magistrate, 19th Court, Mumbai, who ordered his release on bail. On 5th July, 1995, the Director General of the Anti-Corruption Bureau addressed a letter to the General Manager of the BEST Undertaking stating inter alia that the Respondent had been apprehended while accepting a bribe and that he had been arrested. On 26th June, 1995 the Respondent was placed under suspension. The order of suspension was passed under Standing order 25 since, it is common ground, on the date of the suspension the basic salary of the Respondent was Rs.895/- and hence, below Rs.1000/-. Subsequently, a pay revision took place with effect from 1st April, 1996 and the basic salary of the Respondent was revised to Rs.1,295/-. On 9th June, 1997 a charge sheet was issued to the Respondent under Service Regulation 10.2. A disciplinary proceeding

was convened into an allegation of misconduct. The enquiry was instituted under the Service Regulations since according to the Undertaking the Respondent was not an 'employee' as defined in Section 3(13) of the Bombay Industrial Relations Act, 1946 and the certified standing orders were not applicable to him.

2. The Respondent instituted a complaint of unfair labour practices on 16th February, 1998 under Items 9 and 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 before the Industrial Court. Apart from a declaration that the Petitioner was guilty of unfair labour practices and a cease and desist order, the reliefs which were sought before the Industrial Court were (i) An order restraining the Petitioner from conducting the disciplinary enquiry until the criminal case was finally disposed of; and (ii) A direction to the Petitioner to revoke the order of suspension. The Industrial Court was moved in an interim application for staying the disciplinary proceedings pending the outcome of the criminal proceeding. By an interim order dated 17th April,

1998 the Industrial Court declined to stay the enquiry. The disciplinary proceeding thereupon took place and the Court is informed that it resulted in an order of dismissal of 18th June, 2004. On 9th February, 2004, the Respondent was convicted of an offence under Section 7 of the Prevention of Corruption Act, 1988 by the Court of Sessions for Greater Bombay in Special Case 10 of 1997 and was sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1,000/- and in default to undergo rigorous imprisonment for a period of three months. The Respondent was also convicted for an offence under Section 13 and was sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.1,000/- or in default to undergo further imprisonment for a period of three months. The substantive sentences were directed to run concurrently.

3. The complaint which was filed by the Respondent was tried by the Industrial Court and evidence was adduced on behalf of the Respondent as well as on behalf of the Undertaking. One of the defences of the Undertaking was that the Respondent was not an

"employee" as defined in the Bombay Industrial Relations Act, 1946 and that therefore, the complaint was not maintainable. The Industrial Court allowed the complaint by an order dated 4th December, 2001. By the order, the Industrial Court directed the Petitioner to revoke the suspension and to allow the Respondent to resume duties at a place of his choice or, in the alternative, to pay to the Respondent 100% of his wages as suspension allowance in accordance with the standing orders. During the pendency of the proceedings before the the Industrial Court, the Undertaking had addressed a communication to the Respondent on 5th January, 2000. In the communication the Petitioner stated that the Respondent was placed on suspension under Standing order 25 since at the material time his basic salary was Rs.895/- p.m. According to the Undertaking upon the salary revision with effect from 1st April, 1996 his basic salary exceeded Rs.1,000/- and since the Respondent was performing supervisory duties, he was no longer an ’employee’ under Section 3(13). The letter stated that consequently a charge sheet was issued under the Service Regulations. The Respondent was informed that the subsistence allowance which was paid to

him in excess of 1/3rd of his allowance was liable to be recovered.

4. The BEST Undertaking which has filed these proceedings under Article 226 has challenged the order of the Industrial Court on several grounds. The first submission is that the Respondent was not an employee within the meaning of Section 3(13) of the Bombay Industrial Relations Act, 1946 and that therefore, the Industrial Court had no jurisdiction to entertain the complaint under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. Secondly, it is urged that the only two substantive reliefs that were sought in the complaint were for a stay of the disciplinary enquiry during the pendency of the criminal case and the revocation of suspension. Since the application for interim relief came to be rejected, the disciplinary proceedings were continued and have eventually resulted in an order of dismissal. Hence, that prayer does not survive. In so far as the revocation of suspension was concerned, the Industrial Court relied on a Government Circular dated 18th September, 1974 which it was submitted ex facie applies to a

government servant and would not apply to an employee of the Undertaking. These submissions can now be considered.

5. The Respondent was suspended on 26th July, 1995 under the provisions of Standing order 25. On the date on which the order of suspension was passed, it is common ground that the basic salary of the Respondent was Rs.895/-. Consequent upon the pay revision with effect from 1st April, 1996, the basic salary of the Respondent was revised to Rs.1,295/- and the charge sheet dated 9th June, 1997 was thereupon issued under the Service Regulations of the Undertaking. In the complaint as it was instituted two substantive reliefs were sought. The first relief was a stay of the disciplinary proceedings during the pendency of the criminal case. The application for an interim stay was dismissed by the Industrial Court by an order dated 17th April, 1998. At this stage it would suffice to state that the Industrial Court relied upon several judgments in which it has been held that the purpose and object of disciplinary proceedings is distinct from the object of a criminal trial. A disciplinary proceeding is a

proceeding to deal with an errant employee who has breached the Service Regulations. Criminal proceedings are instituted in order to deal with a misdemeanour of a person which constitutes an offence under the criminal law of the land. The standard of proof and the rules of evidence which govern criminal proceedings are distinct from those which govern disciplinary enquiries. On this ground the Industrial Court correctly declined to grant interim relief. The disciplinary enquiry thereafter proceeded and resulted in an order of dismissal on 18th June, 2004. The first prayer, therefore, did not survive. The second substantive prayer in the complaint was for the revocation of suspension. The only averment in support of that prayer was that the investigations by the ACB had been concluded and a charge sheet was filed. Moreover, it was submitted that the Undertaking had also concluded its investigation and the disciplinary enquiry was in progress. Hence, it was submitted that the suspension was illegal and reliance was placed on a Government Circular dated 18th September, 1974. The circular issued by the General Administration Department of the State of Maharashtra on 18th September, 1974 has been placed

on the record. The circular emphasises the hardship which is caused to a government servant where suspension is continued indefinitely pending an investigation by the police. The circular, therefore provides that in case of officers under suspension investigation should be completed and charge-sheets should be filed in a Court of competent jurisdiction in cases of prosecution or involving departmental proceedings within six months. The Chief Secretary has been empowered to grant an extension by a period of three months. The circular then states that Government has directed that if investigation cannot be completed within a period of six months or the extended period granted by the Chief Secretary, the order placing the government servant under suspension should be revoked and he should be permitted to resume duties by posting him to a different post or by transferring him. Now ex-facie, the circular of the Government applies to government servants. The Respondent was an employee of the BEST Undertaking to whom the circular has no application. Even otherwise, there is no absolute rule under which the government or a public employer is obliged to revoke suspension in all cases where investigation

has been delayed beyond a period of six months. Each case has to be evaluated on its own facts and no such inflexible rule exists or can be contemplated. There is no enforceable right to demand the revocation of suspension ipso facto upon the expiry of a period of six, or as the case may be, nine months. In the circumstances, the Industrial Court was, in my view, fundamentally in error in granting relief on the complaint.

6. The Industrial Court held that the Respondent fell within the purview of the definition of the expression "employee" in Section 3(13) of the Bombay Industrial Relations Act, 1946 and consequently it had the jurisdiction entertain the complaint. The complaint, it must be noted, was filed under Section 28 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. Section 3(5) defines an employee, in so far as it is material to the present case, as an employee as defined in Section 3(13) of the Bombay Industrial Relations Act, 1946. Section 3(13) of the Bombay Industrial Relations Act, 1946 defines the expression "employee" as follows :

"3(13) "employee" means any person employed to do any skilled or unskilled work for hire or reward in any industry, and includes -

(a) a person employed by a contractor to do any work for him in the execution of a contract with an employer within the meaning of sub clause (e) of clause (14);

(b) a person who has been [dismissed, discharged or retrenched or whose services have been terminated] from employment on account of any dispute relating to change in respect of which notice is given or an application made under section 42 whether before or after his [dismissal, discharge, retrenchment or, as the case may be, termination from employment];

[but does not include-

(i) a person employed primarily in a managerial, administrative, supervisory

or technical capacity [drawing basic pay (excluding allowances) exceeding [one thousand rupees per month;]

(ii) any other person or class of persons employed in the same capacity as those specified in clause (i) above irrespective of the amount of the pay drawn by such persons which the State Government may, by notification in the Official Gazette, specify in this behalf;]

7. The expression ’employee’ in the substantive part is defined to mean a person employed to do any skilled or unskilled work for hire or reward in any industry. The inclusive part of the definition expands upon the ambit of the expression and in clause (a) brings within the definition even a person employed by a contractor to do any work in execution of the contract with an employer. Similarly, a person who has been dismissed discharged or retrenched or terminated on account of any dispute relating to a change in respect of which a notice is given or an application made

under Section 42 is also to be treated as an employee. Section 3(13) thereafter contains an exception and the first exception is that a person who is employed primarily in a managerial, administrative, supervisory or technical capacity drawing a basic pay exceeding Rs.1,000/- per month will not be regarded as a workman.

8. Evidence was adduced before the Industrial Court on the question as to whether the Respondent was a workman. In the course of his evidence the Respondent stated that he held a diploma in Electrical Engineering; that he had joined the Undertaking as a Senior Stipendary Apprentice and was confirmed as a Deputy Charge Engineer in December 1992. The Respondent stated that as a Deputy Charge Engineer, he was required to attend to messages relating to 'off supply', stop meters, meter removals due to non payment of electric charges and to attend to complaints of customers. The Respondent stated that he was required to collect electric meters in areas where demolitions have taken place and take measurements of cables for the purposes of new connections. In the course of his cross examination the Respondent

squarely admitted that the nature of his work was technical in nature. The Respondent admitted that in his department there were about 9 *Navghanis* and meter readers who were working. The Respondent then admitted that Meter Inspectors were below the cadre of Deputy Charge Engineers. He stated that as Deputy Charge Engineer his grade was T/7 and that on the date of institution of the complaint his basic pay was above Rs.1,000/-. The admission of the Respondent that his work was technical in nature and that his salary on the date of the institution of the complaint was in excess of Rs.1,000/- was sufficient in itself to oust the jurisdiction of the Industrial Court. On the date of the institution of the complaint, the Petitioner was not an employee within the meaning of Section 3(5) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 and the corresponding provision of Section 3(13) of the Bombay Industrial Relations Act, 1946. The matter, however, does not rest on the basis of the admission of the Respondent alone. On behalf of the Undertaking the Assistant Engineer in the Commercial North Department deposed in evidence. He stated that the duties of a Deputy Charge

Engineer consist of supervising technical activities carried out in the SIMHA section of the Undertaking. The Deputy Charge Engineer has to supervise preventive maintenance activities. He has to supervise the work of break down maintenance i.e. electrical faults, shock messages and fire messages. The Deputy Charge Engineer is required to detect causes of 'shock messages' with the help of Meter Inspectors, installation Inspectors, and Navghanis. To detect shock messages special expert knowledge is required and the work is done by the Meter Inspector and *Navghanis* under the supervision of the Deputy Charge Engineer. The witness deposed that there was a manual in the concerned department of the Undertaking which showed the duties of the Deputy Charge Engineer. An extract from the manual was produced and marked in evidence. The duties therein were as follows :

"1. To carry out site investigations for new SIMHA Meter connection in hutment areas.

2. To supervise the job of Meter Inspectors and Nawghanies in respect of shock messages and fire messages in SIMHA meters consumers.

3. To supervise the job of Meter Inspectors and Nawghanies in respect of Preventive Maintenance of SIMHA meters in SIMHA circuit.

4. To prepare draft quotation for shifting the existing SIMHA meter from one place to another in the same hutment or removing the SIMHA meter for installing the conventional meter in the premises.

5. To prepare the overload relief scheme to the existing SIMHA circuit and supervise the Meter Inspectors and Nawghanies for executing the scheme etc."

9. On this material, the Industrial Court could not have possibly come to the conclusion that the Respondent was an employee within the meaning of Section 3(13) of the Bombay Industrial Relations Act, 1946 and an employee within the meaning of Section 3(5) of the Maharashtra Recognition of Trade Unions and Prevention of Trade Unions Act, 1971. Above all, the admission of the Respondent to the effect that his duties were technical and

that his basic wage was in excess of Rs.1,000/- per month was sufficient to oust the jurisdiction of the Industrial Court.

10. There is one aspect of the matter where I am of the view that the exercise of the jurisdiction under Article 226 is called for to alleviate the obvious and serious hardship which would be caused to the Respondent for no fault of his. The order of suspension was issued under the standing orders since at the material time the basic salary of the Respondent was below the threshold of Rs.1,000/- that is prescribed in Section 3(13) of the Bombay Industrial Relations Act, 1946. Subsequently, after the salary revision which took place with effect from 1st April, 1996 the Undertaking informed the Respondent by a letter dated 5th January, 2000 that the amount which had been paid to the Respondent in excess of 1/3rd of his salary was liable to be recovered. Service Regulation 10.6 provides that a member of the staff shall be entitled during the period of suspension to a subsistence allowance at such rate as a suspending authority may direct, but not less than 1/3rd of the pay and allowance which he would, but for the

suspension, have drawn. 1/3rd is therefore, the minimum payment which is required to be made in any event. In these circumstances, when the Undertaking made a payment of subsistence allowance under the standing orders, I do not find any justification for the making of any recoveries from the Respondent. There is no misrepresentation of any kind on the part of the Respondent. The payment of one third is a floor not a ceiling and there is no legal embargo on a payment in excess of a third by way of subsistence allowance even under the Service Regulations. In the circumstances, there shall be a direction to the effect that no recoveries of the subsistence allowance which has already been paid to the Respondent shall be made by the Undertaking.

11. Subject to the aforesaid direction, for all these reasons I am of the view that the order passed by the Industrial Court is unsustainable and that it requires to be quashed and set aside. The Petition is accordingly allowed. The impugned order of the Industrial Court dated 21st December, 2001 is set aside. Complaint (ULP) 177 of 1998 shall according stand dismissed. In the facts of

the case, there shall be no order as to costs.